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ABSTRACT

Many of the court decisions in the 1960s and 1970s regarding student civil rights were decided in favor of students. By the 1980s the courts began to give administrators more authority. This change of judicial thinking means that school authorities must be reschooled concerning the rights of students. This booklet should help administrators understand the limits of their authority in matters of freedom of speech, student publications, search and seizure, drug testing, student-initiated religious activities, special education student discipline, expulsions, and suspensions. (EJS)

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Students and the Law

Lawrence F. Rossow, Janice A. Hininger

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Students and the Law

by
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Introduction

In the decades of the Sixties and Seventies, student civil rights were in their heyday. Many of the court decisions during those years were decided in favor of students, expanding their rights of speech, dress, assembly, and due process. Schools were required to provide both procedural and substantive guarantees when dealing with issues of student rights.

By the 1980s these rights began to be circumscribed, and the public schools again assumed their *in loco parentis* role. The courts gave administrators more authority to control such areas as speech, student publications, and search and seizure. Perhaps the courts were reacting to the public's perception that schools were becoming dangerous places because of drugs, weapons, and violence and felt the need to empower schools to restore order.

However, the courts have not given administrators unlimited authority. The judicial tests developed by earlier, more liberal courts have been replaced with other tests, albeit tests more sympathetic to the plight of school authorities. This change in judicial thinking means that school authorities must be reschooled concerning the rights of students. This fastback should help those responsible for the welfare of students to understand the limits of their authority.

Freedom of Speech

In 1969 the Supreme Court firmly established students' right to free speech in the landmark case, *Tinker* v. *Des Moines Independent School District*. In that case; three students were suspended for wearing black armbands to protest the Vietnam War. The Court held that wearing the armbands was symbolic expression, which could not be punished unless the principal could show that the student behavior would materially and substantially interfere with the operation of the school and the right of other students to learn. The *Tinker* Court did not provide school authorities a test for determining whether actual disruption or merely anticipation of disruption was necessary before they could curtail freedom of expression. Nor did the Court define "substantial disruption." What the Court did say was that school officials may not restrict students' freedom of expression simply because they disagree with the viewpoint expressed or because they believe the student's viewpoint may cause disruption. In the words of the Court, students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."

However, the *Tinker* decision did not give students unbridled license to behave as they please regardless of the circumstances. The freedom of expression protected in *Tinker* pertains only to social, political, and economic issues. Disrespect from students, yelling, or cursing is not protected. School officials may and indeed must enforce reasonable rules to maintain an orderly environment for learning.

Supreme Court decisions in the late 1980s have clarified some parts of *Tinker*. One of those cases, *Bethel School District No. 403* v. *Fraser*, addressed the issue of nonpolitical speech. In that case, a high school student delivered a nomination speech for a friend running for student body office. The speech included numerous sexual innuendos. The student was suspended for three days and told he would not be allowed to speak at the commencement exercises. The student brought suit against the school district and the case reached the Supreme Court. In handing down their decision in favor of the school district, the justices made the following comments:

> Surely it is a highly appropriate function of public school education to prohibit the use of vulgar and offensive terms in public discourse. Indeed the fundamental values necessary to the maintenance of a democratic political system disfavor the use of terms of debate highly offensive or highly threatening to others. Nothing in the Constitution prohibits the states from insisting that certain modes of expression are inappropriate and subject to sanctions. . . . Unlike the sanction imposed on students wearing armbands in *Tinker*, the penalties imposed in this case were unrelated to any political viewpoint. The First Amendment does not prevent the school officials from determining that to permit a vulgar and lewd speech such as respondent's would undermine the school's basic educational mission.

The Court in *Fraser* made it clear that public schools have an important role in imparting respect for civility of public speech. It also made clear that judging the appropriateness of student speech is a matter for school officials – not for the courts.

School boards and administrators must set standards for orderly conduct within the school while still protecting the First Amendment rights of students. As the Supreme Court stated in *West Virginia* v. *Barnette* nearly 50 years ago, because we "are educating the young for citizenship this is reason for scrupulous protection of Constitutional freedoms of the individual if we are not to strangle the free mind at its source and teach youth to discount important principles of government as mere platitudes."

Certainly school administrators may draft policy governing student actions, but the limits placed on free expression must be based on the need to prevent disruption and to ensure the safety of all students and school personnel.

Other forms of expression include student dress and hairstyles. The U.S. Supreme Court has never accepted a First Amendment case claiming that students' choice of hairstyles or dress are modes of free expression. However, state supreme courts and federal appellate courts have rendered decisions in this area, although those courts are not in agreement. A number of courts have conferred constitutional protection for students in the matter of hairstyle choice; others have held for the school districts. Because of this, administrators should be guided by court decisions in their own states. This is not as crucial an issue today as it appears to have been in the Sixties and Seventies.

Student Publications

In February 1988 the U.S. Supreme Court decided its first case dealing with school publications in *Hazelwood School District* v. *Kuhlmeier*. The Court's decision in *Hazelwood* is of great importance because it gives school officials more authority to censor school-sponsored newspapers and other publications. This case now governs actions by school officials to limit student expression

The facts of the case are as follows: Journalism II students at Hazelwood East High School, located in a suburb of St. Louis, Missouri, produced *Spectrum*, the school newspaper. It was the major assignment for the students enrolled in the course, and they received course credit and grades for their work. The school district provided the funds to produce the paper, with additional funding coming from sales of the paper to students at 25¢ a copy.

The journalism teacher who supervised the publication submitted a copy of *Spectrum* to the principal before it was published. When the principal reviewed the May 1983 edition of the paper, he ordered deletion of two full pages of the paper. He stated later that he found only two of the five articles on the pages objectionable but ordered the two pages deleted because he didn't think there was time to do another layout of the pages before the printing deadline.

The two objectionable articles dealt with teenage pregnancy and the impact of parental divorce on a Hazelwood student. Although the

names had been changed in the pregnancy article, the principal thought the students could be recognized from context. Concerning the divorce article, which did name the student, the principal pointed out that the parents had not been consulted.

Three students filed suit under the Civil Rights Act claiming that their First and Fourteenth Amendment rights had been violated and that the deletion of the articles was a form of censorship. The school district responded that because the *Spectrum* was not a public forum but rather a part of the school curriculum, the district had the authority to control its contents. The U.S. Supreme Court agreed with the district. In the words of the Court:

> Educators are entitled to exercise greater control over . . . student expression to assure that participants learn whatever lessons the activity is designed to teach, that readers or listeners are not exposed to material that may be inappropriate for their level of maturity, and that the views of the individual speaker are not erroneously attributed to the school. Hence a school may, in its capacity as publisher of a school newspaper or producer of a school play, "disassociate itself" . . . not only from speech that would "substantially interfere" with its work or impinge on the rights of other students . . . but also from speech that is, for example, ungrammatical, poorly written, inadequately researched, biased or prejudiced, vulgar or profane, or unsuitable for immature audiences. A school must be able to set high standards for the student speech that is disseminated under its auspices – standards that may be higher than those demanded by some newspaper publishers or theatrical producers in the "real world" – and may refuse to disseminate student speech that does not meet those standards. In addition, a school must be able to take into account the emotional maturity of the intended audience in determining whether to disseminate student speech on potentially sensitive topics, which might range from the existence of Santa Claus in an elementary school setting to the particulars of teenage sexual activity in a high school setting. A school must also retain the authority to refuse to sponsor student speech that

> might reasonably be perceived to advocate drug or alcohol use, irresponsible sex, or conduct otherwise inconsistent with the shared values of a civilized social order. . .

Much of the argument in the *Hazelwood* case concerned the issue of whether or not the *Spectrum* was a public forum. Before deciding how much control school officials have over student expression, the courts must determine whether the activity, in this case the publication of a student newspaper, occurs in a pure or semi-public forum or if it occurs in a non-public forum. Examples of "pure" public forums include public streets and parks. Semi-public forums would be university facilities, fairgrounds, or other places that the state has allowed the public to use for expressive activity.

If the school activity is a component of the curriculum, it is not considered an open or semi-public forum. In the *Hazelwood* case, students did receive instruction and grades from the instructor. Because publication of *Spectrum* was intended to be a supervised learning experience for journalism students, the Court declared that no public forum was created.

It is important to note that even though the activity may be considered part of the curriculum, there are some limits that the school authorities must not overstep. The Supreme Court has set forth a two-part test to define those limits. In *Cornelius* v. *NAACP Legal Defense and Education Fund*, the Court said that control over access to a non-public forum can be based on subject matter and speaker identity only if the distinctions drawn are reasonable in light of the purposes served by the forum and are viewpoint neutral.

In declaring school newspapers to be non-public forums, the Court made it possible for school officials to limit student expression more than in the past. However, it is still school officials' decision as to how much freedom of expression to allow. Many, no doubt, will choose not to censor student expression any more than they did before *Hazelwood*. But they do have the option. It would be prudent for school policymakers to take a long, hard look at *Hazelwood* and

to write into the school policy whether the school newspaper is to be a public or non-public forum.

Editor's note: For an expanded discussion of this landmark case, see fastback 274 *Student Press and the* Hazelwood *Decision*, by Jan C. Robbins.

Search and Seizure

One of the thorniest issues for public school authorities is that of searching students. Much of the problem stems from the lack of clarity in applying the Fourth Amendment to the school setting. Judicial interpretations are often contradictory, even at the local level; and procedures that were proper yesterday may be wrong today.

Many had hoped that the Supreme Court, in *New Jersey* v. *T.L.O.*, would end the confusion. While *T.L.O.* did provide new standards for public school searches, the case left many questions unanswered. The primary purpose of this chapter is to provide an understanding of the standards presented by the Supreme Court in *T.L.O.* as well as answers to a number of questions left unresolved regarding search and seizure law in the public schools.

In *T.L.O.*, a 14-year-old female student was caught smoking in the lavatory by a teacher; when brought to the office, her purse was searched by the principal. In addition to cigarettes, marijuana was found. The student contended that the search of her purse violated her Fourth Amendment privacy rights and therefore the evidence should be excluded from juvenile proceedings. New Jersey argued that the Fourth Amendment does not apply to students. They advanced the theory that school officials stand *in loco parentis*. Therefore, school personnel act in place of parents and not as government officials.

The Court rejected the New Jersey argument and maintained that school authorities are state officials, not stand-ins for parents. There-

fore, the Fourth Amendment does apply to the school setting and students do have some privacy rights.

However, in deference to school authorities' difficult task in maintaining an orderly environment, the Court recognized that students' privacy rights have limitations. The Court ruled that the Fourth Amendment does not protect subjective expectations of privacy that are unreasonable or otherwise illegitimate. For example, a student does not have the protection of the Fourth Amendment to bring contraband onto school property. A balance must be maintained between students' privacy rights and the school's interest in maintaining order. Thus, the Court established the "reasonableness standard."

The Reasonableness Standard

The Court felt that requiring a search warrant or probable cause would "interfere with the maintenance of the swift and informal disciplinary procedures needed in the schools." The better rule, the Court held, is that "the legality of a search of a student shall depend simply on the reasonableness, under all circumstances, of the search." In using the reasonableness standard, a two-part test was offered: First, was the search justified at its inception; in other words, did the searcher have reasonable suspicion? Second, was the search reasonable in scope; that is, was the search more intrusive than it had to be and was the type of search related to the object to be found?

Reasonable Suspicion

In order for the reasonable suspicion test to be met, two variables must be evaluated: the object for which the search is conducted and the source of the tip that prompted the search.

When a school official is in search of a gun carried to school by a student, the situation is different than if the object of the search is a pack of cigarettes. The potential danger to others should be considered in determining reasonable suspicion. As a general propo-

sition, the higher the degree of danger the less suspicion is required.

The search for a dangerous thing can be classified as one of the exceptions the courts have made to the probable cause and warrant requirement applicable to police. Called the "emergency" exception, it can be characterized as a situation where the object of the search (for example, a bomb) is so inherently dangerous that a search must be conducted immediately to avoid injury.

A companion to the danger element in the emergency exception is the consideration of time. In other words, is there a chance that evidence will be lost if the search is postponed? This situation has been referred to by the judiciary as the "now or never circumstance." In school, common objects for a search are drugs, which are easily destroyed. Therefore, if the school official believes that the evidence could be destroyed, the search might be conducted with less concern for a high degree of suspicion.

In addition to evaluating the object, the source and sufficiency of the information that caused the search to be initiated also must be considered. The general standard for assessing the reliability of information was provided by the Supreme Court in *Illinois* v. *Gates*. In *Gates*, the Court held that the standard is the "totality of circumstances analysis," where the informant is assessed to decide whether there is probable cause to believe that contraband or evidence is located in a particular place.

There are some general gradations based on the classification of the tipster. Tipsters in the school setting tend to be one of three types: teachers (and other adult school personnel), students, and anonymous phone callers or letter writers. The *T.L.O.* Court, as well as lower courts, upheld searches that are based on information provided by school personnel. Tips from this source usually can be considered reliable. However, tips from students need to be weighed carefully. It is possible that the number of students providing the tip may have an effect. In cases where the courts have assumed the reliability of

student tipsters, there has been more than one student providing the tip. Courts have specifically evaluated the sufficiency of information from a student tipster and even invalidated the search when only one student provided the tip. To be safe in using a tip from only one student, the student should have a prior history of providing accurate information about illegal activities.

Recently, a federal district court in Illinois upheld the use of an anonymous tip in searching a student suspected of drug dealing. The principal received a phone call from a person identifying herself as someone living in the school attendance area. The caller correctly identified the student and the location and type of contraband for which the principal was to search. The same day, the principal received another anonymous call from a voice he believed to be that of the earlier caller. This time she identified the student as a drug dealer and said where in the lining of a coat the principal could find contraband. This case is one of the first post-*T.L.O.* decisions. The court evaluated the sufficiency of the anonymous tip and judged it adequate to satisfy the reasonable suspicion test.

In addition to the dangerousness of the object and the reliability of the informant, school officials should consider the following: 1) the role of sniff dogs, 2) the student's prior history, 3) school officials' experience, and 4) individualized suspicion.

A sniff dog is a source of information; it is a four-legged tipster. Courts have considered sniff dogs reliable in establishing reasonable suspicion, but only when used for searching inanimate objects. In fact, the courts are not willing to call use of a sniff dog a search, reasoning that students do not have a reasonable expectation of privacy in the airspace surrounding lockers or cars.

The reasonable suspicion test also can be met when a search involves a student who has a record of contraband activities, but only if the student's suspicious activity is related to his or her specific history. For example, if a student with a history of carrying knives were to be seen trying to conceal something in his or her clothes, this might

help satisfy the suspicion text. However, a student's reputation as a "bad character" could not be used as a basis to conduct a search anytime that student looked suspicious.

If a school official who is to conduct a search has had some experience in correctly identifying illegal activity, it also can help meet the reasonable suspicion test. For example, the principal may be experienced in correctly identifying marijuana smoke by smell. This ability may serve to establish reasonable suspicion for undertaking a search. While a searcher's prior experience in identifying illegal or rule-breaking activities is helpful in meeting the reasonable suspicion test, caution is needed in assessing the quality of that experience. A school official must act on more than a "hunch." In cases where the principal "feared" the rise of drug problems or when there were plausible alternative explanations for what appeared to be suspicious student activity, reasonable suspicion was found to be lacking.

A searcher also must have reasonable suspicion that the student to be searched is the one who is in possession of the contraband. Courts have been unwilling to allow searches of "entire classes" in order to discover contraband. Exceptions to the individualized suspicion requirement may exist when something other than the student's "person" is being searched, for example, lockers, desks, or cars.

Reasonable Scope

The second prong of the reasonableness standard is reasonable scope. Once the reasonable suspicion test is met, reasonable scope should be considered. A search will be permissible when the measures adopted are reasonably related to the objectives of the search and are not excessively intrusive in light of the age and sex of the student and the nature of the infraction.

The closer the searcher comes to the body, the higher the degree of intrusiveness and therefore the greater the scope of the search. The highest degree of intrusiveness would be associated with a strip search; the lowest would be the search of an inanimate object such as a locker.

Therefore, when searching a student's person, a higher degree of suspicion and danger are required than when searching a locker or car. When searching a student, the typical situation calls for emptying pockets, purse, or school bag. If a student is actually wearing the clothes, purse, or bag at the time, then it is a search of a person. If these objects (jackets, purse, or bags) are in the student's locker or car, then it is not a personal search.

The more "personal" the search, the more compelling interest must be displayed by the school. An example of a compelling interest of the school might be searching for a bomb or a loaded gun. Less compelling would be searching for tobacco because the school has a rule prohibiting the possession of tobacco. A rule of thumb might be: The more personal the search, the more serious reasons the school should have for conducting the search.

When the Supreme Court talked about being "too intrusive," they suggested the not uncommon problem of strip searches. The Court included the age and sex of the student with its concern for excessive intrusiveness, which comes close to a warning about using strip searches on young children of the opposite sex. While protecting against an unnecessary strip search might have been a foremost thought for the Court, the test itself permits gradually more intrusive methods of searching as the student becomes older. However, the intrusiveness of a search will be limited even with older students if the searcher and the student are not of the same sex.

A school official has several methods available that can be used in personal searches. Asking students to "empty pockets" or purses is the least intrusive search, because the student participates and no physical contact is made between the parties. The "pat down" method will often be used by school security personnel in searching for weapons. Reaching into pockets, purses, or bags to find contraband increases intrusiveness if the student is wearing the items at the time; otherwise, a search of this kind would be treated as a search of an inanimate object.

Drug Testing

Drug abuse is a serious problem in our society and in many schools. Among the many efforts schools have made to deal with the problem is drug testing. School officials must exercise caution before initiating drug testing of students because constitutional rights are involved. This section will address those rights.

Compulsory drug testing for all students, specifically urinalysis, has been frowned on by the courts. Urinalysis is a test to determine whether a person has used drugs, including marijuana and cocaine. But urinalysis is comparable to a nude search and involves students' Fourth Amendment rights.

That standard was established in 1985 in the case of *Odenheim* v. *Carlstadt-East Rutherford Regional School District* and again in 1987 in *Anable* v. *Ford*. In these cases the court found that because urinalysis involves disrobing in the presence of an observer, it constitutes a search; and in order to justify a search, there must be reasonable grounds for suspecting that the search will turn up evidence that the student has violated the rules of the school or some law. It is extremely unlikely that every student in a school would give officials a "clear indication" that they were breaking the school rules concerning drugs.

In the *Odenheim* case, compulsory drug testing was part of a required annual medical examination to ensure the physical fitness of all students. The school claimed that because the drug testing was part of a medical procedure, there was no intrusion into the students'

privacy. However, the court noted that the school board policy provided for suspension of students involved in drug activity and that the urinalysis was not "reasonably related in scope to the circumstances which initially justified the interference."

The court in *Anable* noted that "requiring a teenaged student to disrobe from the waist down while an adult school official, even of the same sex, watches the student urinate in the 'open' into a tube is an excessive intrusion upon the student's legitimate expectations of privacy under the circumstances present." Furthermore, because the urine test can indicate drug usage weeks prior to the test, it is an improper attempt by school officials to regulate off-campus conduct unrelated to school discipline.

This is not the whole story, however. When it is a question of drug testing for extracurricular activities, the picture changes somewhat.

In the case of *Schaill* v. *Tippecanoe School Corporation*, the court distinguished athletics from other student activities. In that case, students had challenged the school board's decision to institute a random drug-testing program for all students wishing to participate in athletics or cheerleading. Board policy required parents to sign a consent form allowing the student to submit to urinalysis on a random basis. During the test a same-sex monitor stood outside the stall to listen for the normal sounds of urination, the toilet water was tinted, and the sample was checked for temperature to ensure genuineness.

Given an accurate test with no other explanation of a positive result, the first positive test resulted in the suspension of the student for 30% of the athletic season. Two positive tests resulted in a suspension for 50% of the season; and three positive tests barred the student from athletics for the full athletic season. A fourth positive test resulted in a bar from athletics for the remainder of the student's high school career.

The students claimed that the testing violated their rights under the Fourth and Fourteenth Amendments. The Seventh Circuit Court of Appeals determined that the testing constituted a search and there-

fore had to meet the standard of reasonableness set out in *T.L.O.* However, the court decided that the school district's decision to implement the drug-testing policy was a reasonable response to the serious nature of drug problems in the schools and that the students' rights were not violated even though this was a random search without individualized suspicion. Why was this drug-testing decision so different from those in *Anable* and *Odenheim*?

The *Schaill* court used the following rationale: First, because the drug-testing program was administered to interscholastic athletes, the expectation of privacy was diminished. The court reasoned that the element of communal undress and the routine nature of physical examinations in connection with athletic programs bring with them a reduced expectation of privacy. In addition, the consent by students prior to becoming involved in athletics gave students notice. Finally, the *Schaill* court reasoned that the search was not intended to uncover evidence for criminal investigation.

The students had also claimed that the procedures were insufficient under the due process clause of the Fourteenth Amendment. The court disposed of that argument, saying that "Since TSC's drug testing program provides for confirmatory testing at no cost to the student and provides the student with notice of the results of the test and an opportunity to rebut a positive result, we cannot find that TSC's drug testing program violates the Due Process clause."

A case involving random drug testing for students involved in extracurricular activities other than, or in addition to, athletics produced different results. A class-action suit was brought by a high school student participating in Future Farmers of America. The Fifth U.S. District Court in *Brooks* v. *East Chambers Consolidated Independent School District* found for the student and granted a permanent injunction against a random drug-testing program for students in grades seven through twelve who wish to participate in any extracurricular activity.

The school district's drug-testing plan was for 30 students per month, chosen at random, to be required to submit to a urinalysis. Students

refusing to submit to the testing were excluded from participating in extracurricular activities until a urine sample was provided. A student whose urine sample tested positive was barred from extracurricular activities until a negative test was submitted.

Referring to the two-pronged test in *T.L.O.*, the court found no individualized suspicion for the testing and no extraordinary circumstances (such as testing of athletes) to justify the testing. It was noted that no evidence was presented at the trial to show that participants in extracurricular activities were more likely to use drugs than non-participants.

All the courts considering these cases have stated that reducing illegal drug use among students is a laudable goal; however, they disagreed with how the goal can be accomplished. What implications do these decisions have for school policy?

Before developing policy concerning drug testing of students, school officials should determine the goals of the program. Is the goal to reduce usage at school or usage in general? Is the goal to treat only those already involved? The policy should be tailored to meet the preestablished goals. Furthermore, the policy must either have a method for determining the individualized suspicion necessary to institute the urine test as required by the court in *T.L.O.* or an identified compelling interest that justifies the intrusion into the student's privacy without individualized suspicion as set forth in *Brooks*. The method of collecting the urine should ensure as much protection of the student's dignity and privacy as possible, while still being controlled enough to ensure an accurate sample. To protect the due process rights of the students, they should be notified prior to the testing and be given an opportunity for a hearing if the tests are positive.

The question of drug testing of high school students has not been resolved by the courts. Certainly there will be more challenges to drug-testing programs as more schools attempt to implement them. Given the possibility that urine tests are too intrusive to be justified by the generalized goal of reducing drug abuse, serious consideration must be undertaken before implementing any drug-testing plan.

24.

Student-Initiated Religious Activity

Allowing voluntary student prayer groups to use school facilities is only the latest of a series of church-state issues that school officials and the courts have had to address over many decades. Until recently the position of courts has been to uphold a strict separation of church and state with regard to allowing student prayer clubs in school. In 1984 things changed when Congress passed the Equal Access Act (EAA). The EAA requires that all public secondary schools that receive federal funds and that allow student clubs not related to the curriculum also must grant access to student-initiated groups wishing to use facilities for religious, philosophical, or political purposes.

The Mergens Decision

In 1990 the U.S. Supreme Court upheld the constitutionality of the EAA in *Board of Education of the Westside Community Schools* v. *Mergens*. In that case, a group of students tried to establish a prayer group as a student club. The school already had a number of clubs not related to the curriculum, such as a chess club and scuba diving club. When the prayer club was denied recognition, the students sued, invoking the EAA. In its defense the school asserted that all the clubs, in fact, were related to the curriculum.

The questions before the Court were: 1) Who decides what is curriculum-related and not curriculum-related? and 2) Is the Equal Access Act constitutional? In answering the first question, the Court

noted that the school was not at total liberty to decide what was curriculum-related and not curriculum-related. There must be some limits placed on school officials' discretion to label, for example, a chess or scuba club as related to the curriculum. Justice Sandra O'Connor, writing for the majority, makes the distinction as follows: "A student group directly relates to the school curriculum if the subject matter is actually taught, or will soon be taught, in a regularly offered course; if the subject matter of the group concerns the body of courses as a whole; if participation in the group is required for a particular course; or if participation in the group results in academic credit."

Regarding the second question, the Court, in ruling that the EAA was constitutional, argued that high school students were mature enough to be able to understand that the school is not endorsing religion just because it allows a student prayer club to meet at school. Therefore, as long as students can perceive neutrality by the school, the separation of church and state is preserved.

Practical Implications

Although the *Mergens* decision was welcomed in some quarters as a victory for freedom of expression, it presents some difficult problems for school officials. The Court recognized these problems in both concurring and dissenting opinions. For example, Justices Kennedy and Scalia, concurring with Justice Stevens, point out that:

> One of the consequences of the statute, as we now interpret it, is that clubs of a most controversial character might have access to the student life of high schools that in the past have given official recognition only to clubs of a more conventional kind.

Some of those clubs of a "most questionable character" could cover the whole spectrum of political and religious opinion in the country, from the Ku Klux Klan to to gay-rights groups, from "Moonies" to Hare Krishnas.

Another problem could arise when a student club restricts its membership or discriminates in ways that federal law prohibits. In order for a school to continue to receive federal funds, there can be no discrimination in any program on the basis of creed, race, sex, age, national origin, or handicap. The school will have to stand ready to ensure that no club discriminates on the basis of religion.

Those schools wishing to avoid the addition of controversial clubs would also have to disallow many other clubs. The EAA requires that religious, political, or philosophical clubs be recognized only when other noncurriculum-related clubs have recognition. Therefore, one alternative for the school is to purge itself of all clubs not related to the curriculum. Another alternative is to schedule all extracurricular clubs to meet during the school day. The EAA applies only to those clubs that meet before and after school.

How will the schools handle the students' complaint that they can not get into certain religious clubs? How will the schools handle parent objections to the presence of "cult" groups in the school? When the school seeks to exclude a gay-rights club, will the EAA protect the club? The *Mergens* decision is not the end of a controversy. It is the beginning.

27

Discipline of Special Education Students

The enactment of Public Law 94-142, the Education of All Handicapped Children Act (EHA) in 1975, and subsequent laws have given powerful rights to students with disabilities and their families. To date the only legal restrictions on how school authorities may handle the misbehavior of special education students concern suspension and expulsion. The expulsion of handicapped students has been one of the most controversial issues litigated since the EHA was implemented in 1978.

Other methods of disciplining handicapped children have not received as much attention. Two cases involving other methods of discipline are *Cole* v. *Greenfield Central Community Schools* and *Hayes* v. *Unified School District No. 377.*

Cole reaffirmed that handicapped students are not exempt from reasonable disciplinary measures. In that case an emotionally disturbed student challenged specific discipline techniques as a violation of his constitutional right to due process. The court found that paddling, isolation seating, and taping the student's mouth did not violate the student's rights. The paddling was not excessive and was preceded by a discussion with the child's father and warnings to the student. Isolation was characterized as a relatively innocuous discipline technique and was warranted because of the child's behavior.

In *Hayes* the federal district court held that use of a time-out room for cool-down periods did not violate the handicapped student's lib-

erty and property rights. The court noted that using time-out rooms may not be the most effective method of discipline, but students were not deprived of an education.

Regardless of the *Hayes* decision, school administrators should take precautions when disciplining handicapped students even if suspension or expulsion is not involved. Disciplinary measures should be spelled out in the student's Individualized Education Program (IEP). The IEP is a written statement of the handicapped child's present educational performance, the goals to be achieved, the specific services to be performed including dates and criteria, and procedures and schedules for evaluating achievement of the objectives. The IEP is developed cooperatively by special education staff, the child's teacher, the parents, the public agency representative supervising the special education, and, when appropriate, the child.

The remainder of this chapter will deal with suspension and expulsion of handicapped students. Suspension refers to exclusion from school for up to 10 school days, and expulsion means exclusion from school for more than 10 school days. Serial suspension refers to successive disciplinary suspensions from school, program, or related services, each of 10 days or less during the same year. These definitions apply as well to regular students; however, the rights of handicapped students differ greatly from those of regular students.

EHA imposes extensive procedural requirements on schools receiving federal funds. One of the major requirements is that handicapped children and their parents must be notified of any proposed change in their educational placement. In *Stuart* v. *Nappi* the ruling was that the use of expulsion as a means of changing the placement of a handicapped child must be made after the IEP team considers the child's needs. In addition, the following issues were decided in *S-1* v. *Turlington*:

1. Before a handicapped student can be expelled, a trained and knowledgeable group of persons must determine whether the student's misconduct bears a relationship to his or her handi-

capping condition. If there is no relationship, normal discipline guidelines for regular students may be followed.

2. An expulsion is a change in educational placement, thereby involving the procedural protection of the EHA and the Rehabilitation Act.
3. Expulsion is a proper disciplinary tool, but a complete cessation of educational services is not proper.
4. Students are entitled to due process hearings.

While *Turlington* did hold that expulsion is a change of placement, the court recognized that the local school board has the authority to remove a handicapped child if the child is endangering himself or others. Furthermore, the court stated that nothing in the legislative history suggests that Congress intended to remove the board's authority and responsibility to ensure a safe school environment.

In 1988 the U.S. Supreme Court, in *Honig* v. *Doe*, decided that school authorities could not unilaterally exclude handicapped children from the classroom for dangerous or disruptive conduct attributable to their handicap.

The *Honig* case was brought to the federal district court in 1980 when officials of the San Francisco Unified School District attempted to expel indefinitely two students who had been classified emotionally disturbed. The first student, Doe, had a history of responding aggressively to his peers' ridicule. After being taunted, Doe choked another student and also broke a school window. The major goal of his IEP had been to improve his ability to cope with his peers. On the fifth day of a five-day suspension, school officials proposed an indefinite expulsion; and Doe's parents filed suit.

The other student in the case, Smith, was also classified as emotionally disturbed and was excluded for violent behavior. Smith entered the *Doe* litigation to protest the school district's discipline policies as they were applied to emotionally disturbed children. Both the district court and the Ninth Circuit Court of Appeals held that an indefinite suspension is a violation of federal statutory requirements

relating to a change of placement. The courts further stated that the state must provide alternative programs for suspended students when the local districts were not providing them.

The district court clarified for the first time the EHA's "stay-put" provision. The court held that the EHA precluded a unilateral change in placement for any reason. The appeals court also held for the students. The Supreme Court upheld the lower courts' decisions and stated that handicapped students may not be unilaterally excluded for dangerous conduct resulting from their handicap and must remain in the current educational placement while their program is being reconsidered.

What, then, can be done with students whose conduct is considered dangerous? The Court noted that the only way that schools can overcome the stay-put provision is to seek judicial review under the EHA and seek emergency injunctive relief in court. The Court stated that schools are able to suspend students for up to 10 school days, during which time they can seek relief in an appropriate judicial forum. In such a situation, the stay-put provision "effectively creates a presumption in favor of the child's current educational placement." The school must demonstrate that maintaining the student's placement is "substantially likely to result in injury either to himself or herself, or to others."

The rights of handicapped students concerning discipline and other issues are not likely to be significantly diminished, and it is imperative that educators be aware of the laws. In designing a disciplinary sanction for a handicapped student, school officials must take care that the student's right to a free and appropriate education is not abridged. However, this does not mean that they should avoid disciplining the student because he or she is handicapped. Other students are entitled to be educated in an orderly and safe environment. At the present time, it would be prudent for educators to consider the following rulings and guidelines:

1. The use of expulsion as a means of changing placement must be made after a team of experts considers the child's needs.

2. Expulsion is a change of placement.
3. Handicapped students may not be excluded for more than 10 days without exhausting the due process procedures of the EHA, except where extreme dangerousness is proven to the court.
4. For suspensions of more than 10 school days, additional procedures should be followed: An IEP team must determine if the student's behavior is related to the handicap and, if so, the IEP must be revised to reflect the change in placement. In that case, the school must provide an alternative program. When the behavior is not related to the handicapping condition, the procedures established for regular students should be followed. However, any long-term changes in the student's current school program should be recorded in the IEP.
5. In an emergency situation when the student is endangering himself or others, the school has the authority to remove the child from school immediately. However, the IEP team must convene as soon as possible after an emergency removal to determine further appropriate action. In any event, the local district's due process procedures must be followed.
6. Discipline problems that an IEP team is able to anticipate may be addressed on an individual basis in the child's IEP.

It is important for school administrators to understand the law concerning 10-day suspensions for handicapped students. If a student's misconduct is determined to be a manifestation of the handicapping condition or due to an inappropriate placement, then the student may not be suspended for more than 10 school days. During a 10-day suspension, local school authorities may seek to persuade the parents to agree to an interim placement or, if they refuse, to invoke the aid of a court to remove the student.

Honig required that all administrative remedies under EHA must be exhausted before either party may resort to judicial review. Exceptions to that rule are allowed when exhaustion would be futile or inadequate. The school district would have to prove the futility of

exhaustion. The school district must be able to show that there is a substantial likelihood that maintaining the current placement would result in injury either to the handicapped student or others before the court's intervention.

Serial suspensions are handled somewhat differently. The Office of Civil Rights determined that a series of suspensions totaling 10 days or fewer is not considered a significant change of placement. A series of suspensions that are each of 10 days or fewer (but total more than 10 days) must be examined on a case-by-case basis to determine if it constitutes a significant change of placement. The length of each suspension, proximity of the suspensions to one another, and the total time of the student's exclusion from school must be considered.

Expulsions and Suspensions

Prior to the mid-Seventies, students could be excluded temporarily or even permanently from school at the discretion of an administrator. However, on 22 January 1975, limits were placed on the discretionary authority of school administrators by the U.S. Supreme Court. In *Goss* v. *Lopez*, some Columbus, Ohio, students had been suspended for several weeks without a notice or a hearing. The Court noted that students enrolled in the public schools have a property interest in continued attendance. At a minimum, before students can be excluded they must be given:

1. oral or written notice of the charges,
2. an explanation of the evidence if the student denies the charges, and
3. some kind of hearing where the student has an opportunity to present his or her side of the story.

These minimum requirements apply to short-term suspensions of 10 days or fewer. The Court provided no guidelines for suspensions of more than 10 days. However, it did state that it expected that suspensions of more than 10 days would call for more formal procedures.

The Court recognized that there may be an occasion when students must be removed immediately because they pose an immediate threat to themselves, to others, or to school property. In these emergency situations, the student may be removed immediately without a hearing. However, a hearing must be provided eventually – presumably when the danger has passed.

Short-Term Suspensions

The Court in *Goss* considered the procedural requisites of the short-term suspension to be informal. Therefore, only the most serious omissions on the part of the suspension officer would pose legal problems.

Unlike long-term suspensions, to be discussed later, there typically is no time lapse between the short-term suspension notice and the commencement of the hearing. In practice, the student is called to the office, where a school official informs the student that he or she is about to be suspended. The hearing begins after this announcement. Unless prescribed by state law or school district policy, there is no requirement that parents be notified. However, as a matter of common sense, the school should try to contact the parents.

The form of the notice can be informal. What counts is that the student be informed that he or she is being considered for suspension before the decision to suspend is announced. To do otherwise would be to have made the decision before the student is given an opportunity to think about the matter and to offer a defense. As with the notice, the hearing can be informal; even a "give-and-take" discussion will satisfy the hearing requirement for a short-term suspension. The setting for the hearing is irrelevant. The hearing could take place in the hallway, the playground, or as the student is getting off the bus.

As to the nature of the evidence required for a short-term suspension, *Goss* requires merely that the suspension administrator provide an explanation of the evidence if the student denies the charges. Beyond the requirement that the suspension be based on some fact, there are no additional considerations.

Long-Term Suspensions

Because long-term suspensions represent a higher level of deprivation for the student, additional procedural safeguards must be offered. However, because there is no Supreme Court decision that guides the process, the case law in the school district's jurisdiction

and state statutes will control the procedures. There are common elements to the long-term suspension process that hold true in most school districts.

Unlike the notice for short-term suspensions, a long-term suspension notice should be sent to the parents. In addition, a written notice should be sent to the student when the student has reached the age of 18. Federal courts and most state statutes require that the notice to suspend for more than 10 days be in writing and be sent by registered or certified mail. It also is recommended that the notice be sent by regular mail as a precaution against registered or certified mail being refused or otherwise not received. The notice itself should contain the following information:

1. the intent to expel the student;
2. the specific charges against the student;
3. what rule was broken;
4. the nature of the evidence supporting the charges;
5. the date, time, and place where the hearing will be held;
6. a copy of the procedures that will be followed at the hearing; and
7. a reminder of the applicable rights for the student and parents, which may include right to counsel, a copy of the hearing transcript, and a presentation of witnesses and cross-examination of hostile witnesses.

The hearing that follows must be formal. Usually, the formality of the process is defined by state statute and typically includes the presence of attorneys, presentation of evidence, presentation of witnesses, and recording the hearing.

The formal hearing must be conducted by an impartial trier of fact. An impartial trier of fact is someone who was not involved in gathering facts or witnessing events that lead to the student being brought to the hearing. For example, a principal who was personally responsible for apprehending and questioning a student who came to school with drugs would not be an impartial trier of fact.

Parents may waive their right to a hearing. In such cases, the school district should receive a written waiver from the parents. Unless the school has a written waiver, a hearing should be scheduled anyway. The New York Supreme Court ruled against a school district when it did not hold a hearing for an expelled student because it did not receive any communication from parents as to whether they wanted a hearing.

Common Errors in Suspensions

An error for suspension purposes would mean either not giving enough due process to a student or giving more due process than is required. It is wise for the district to err on the side of caution when it is in doubt about what process is due a student. The best situation, however, is to make an informed choice based on an accurate understanding of the law.

One common error stems from the confusion between a criminal and an administrative proceeding. A school suspension is an administrative proceeding. Unlike criminal arraignment, such standards as double jeopardy, the right to remain silent, and Miranda warnings are not rights that students have during suspension.

Conclusion

Students' rights have changed in the last 10 years. However, while school authorities seem to have been given back the power to control students, the situation might more accurately be viewed as a change in the kind of power that courts will recognize as constitutional.

The courts have taken traditional methods of controlling student behavior and have given them a legitimate legal status. For example, educators do not have to follow the probable-cause standard when searching students. However, this does not mean that they can search without any regard to students' rights. The U.S. Supreme Court developed a different legal standard for school authorities to follow in searching, the reasonableness standard. The Court considered this alternative standard more appropriate for the education environment. Similar examples of different legal standards for educators can be found in cases involving free speech and student publications.

It is important for those responsible for the welfare of students to re-educate themselves for an accurate understanding of current law as it applies to the rights of students. A wise school system will keep the law in its head and the welfare of students in its heart.

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